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No. 97-2080

In the Supreme Court of the United States

OCTOBER TERM, 1997

J & E SALVAGE COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the government's refusal to return helicopter transmissions that were inside containers that petitioners purchased at auction as surplus property constitutes a taking under the Just Compensation Clause of the Fifth Amendment, where the transmissions came into the government's possession pursuant to court order.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is not yet reported. The opinion of the Court of Federal Claims denying petitioners' Fifth Amendment claim (Pet. App. 17a-25a) is reported at 36 Fed. Cl. 192, and its order denying reconsideration (Pet. App. 26a-29a) is unreported. The opinion of the Court of Federal Claims dismissing petitioners' contract claim for lack of jurisdiction (which is not reproduced in the petition's appendix) is reported at 37 Fed. Cl. 256. The related decision of the United States District Court for the Eastern District of North Carolina is unreported. *United States* v. *J & E Salvage Co.*, No. 92-162-Civ-4-H (Aug. 19, 1994). The opinion of the United States Court

of Appeals for the Fourth Circuit on appeal of that decision (Pet. App. E) is reported at 55 F.3d 985.

JURISDICTION

The court of appeals entered its judgment on March 25, 1998. The petition for a writ of certiorari was filed on June 23, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 484 of Title 40 of the United States Code governs the disposition of surplus governmental property. Subsection (d) of that Section provides:

> A deed, bill of sale, lease, or other instrument executed by or on behalf of any executive agency purporting to transfer title or any other interest in surplus property under this subchapter shall be conclusive evidence of compliance with the provisions of this subchapter insofar as concerns title or other interest of any bona fide grantee or transferee for value and without notice of lack of such compliance.

40 U.S.C. 484(d).

2. The Defense Reutilization and Marketing Office in the Department of Defense held an auction at the Marine Corps Air Station at Cherry Point, North Carolina, to sell surplus property. The property was sold by lots. Petitioners, a salvage company and its partners, purchased several lots, including those described in the Invitation for Bids and Notice of Award as: "Shipping & Storage Container: 2 EA." Pet. App. 2a. The containers were bolted shut at the time of the sale, so petitioners were unaware that anything was

inside them. Petitioners paid a total of $1,075 for the containers. *Ibid.*

After the auction, petitioners discovered that four of the containers held helicopter transmissions, which had a total value of more than $1,150,000. When petitioners notified the Defense Reutilization and Marketing Office of their discovery, the Office advised petitioners that the transmissions were the property of the government and demanded their return. Petitioners refused. Pet. App. 2a.

3. The government filed suit in the United States District Court for the Eastern District of North Carolina against petitioners for wrongful conversion and replevin. The district court ordered petitioners to return the transmissions to the government. Pet. App. 2a; *United States* v. *J & E Salvage Co.*, No. 92-162-Civ-4-H, slip op. at 2-5 (E.D.N.C. Aug. 19, 1994). Rather than seek a stay, petitioners complied with that order. Pet. App. 3a. In conjunction with their return of the property, petitioners entered into a limited settlement agreement with the government. C.A. App. A95-A99. Under that agreement, petitioners agreed to exchange the containers housing the transmissions for empty containers. Petitioners agreed that "title to the containers in which the transmissions are located will transfer to the United States upon their physical transfer." C.A. App. A96. Only if a court "subsequently determined that the transmissions are in fact the [petitioners'] property" would the petitioners "have the right to exchange empty containers for the containers containing the transmissions." C.A. App.

A97.[1] Pursuant to the agreement, petitioners returned the containers with the transmissions to the government on September 9, 1994. Pet. 3.

Petitioners appealed, and the Court of Appeals for the Fourth Circuit ruled that the dispute between petitioners and the government was contractual in nature, so that the Contract Disputes Act, 41 U.S.C. 601-613, deprived the district court of jurisdiction. Pet. App. 30a-40a.

Petitioners then demanded return of the transmissions from the government. Pet. App. 3a. The government declined on the ground that the transmissions had not been conveyed to petitioners by the sale of the containers, and thus remained the property of the United States. *Ibid.*[2]

4. Petitioners brought this suit in the Court of Federal Claims seeking compensation for the transmissions on the ground that the government's refusal to return them constituted a taking of property without just compensation under the Fifth Amendment. Pet. App. 3a. The Court of Federal Claims held that petitioners had not stated a claim under the Just Compensation Clause because their allegations gave rise to a breach-of-contract, not just compensation, claim. *Id.* at 21a-23a. The court also held that, in "a contest between two parties over conflicting claims of ownership * * * it is axiomatic that there is not [a] taking" where the government takes possession "pursuant to a court

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[1] By contrast, the agreement provided that the financial provisions of the settlement would be nullified if the district court's order was reversed on appeal for any reason. C.A. App. A98.

[2] Because the court of appeals did not decide that title vested in petitioners, the reversal of the district court did not entitle petitioners to recover the containers with the transmissions pursuant to the settlement agreement. C.A. App. A97.

order." *Id.* at 23a.[3] Petitioners then amended their complaint to state a breach-of-contract claim. *Id.* at 4a. The Court of Federal Claims subsequently dismissed that claim for lack of jurisdiction, because petitioners had not submitted a valid claim to the contracting officer, as required by the Contract Disputes Act, 41 U.S.C. 605(a). Pet. App. 4a; see 37 Fed. Cl. 256, 260-263. Alternatively, the court held that petitioners' breach-of-contract claim lacked merit. Pet. App. 4a; see 37 Fed. Cl. at 263-266.

5. The court of appeals affirmed. Pet. App. 1a-15a. The court held that petitioners had "never acquired a compensable property interest" in the transmissions necessary to support a Fifth Amendment just compensation claim because "the transmissions were never part of the subject matter of the contract" between the parties. *Id.* at 5a. The court noted that the description of the items for sale in both the Invitation for Bids and the Notice of Award "clearly and unambiguously referred only to the containers and not to their contents." *Id.* at 5a-6a. The court further held that "[t]here is no indication that either party intended to buy or sell anything other than the containers themselves." *Id.* at 6a.

The court of appeals also rejected petitioners' argument that 40 U.S.C. 484(d) and the applicable Defense Department Manual required that the sales contract include both the containers and their contents. Pet. App. 6a-10a. Relying on the statute's "plain language," the Federal Circuit ruled that Section 484(d)'s "conclusive presumption regarding title only

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[3] The court also found that the government was acting in its proprietary, rather than sovereign, capacity in conducting the sale of surplus property. Pet. App. 22a-23a.

applies to the property which the instrument purports to transfer," which in this case was limited to the containers. *Id.* at 8a-9a. The court similarly rejected petitioners' argument based on the Defense Department Manual's provision stating that the government makes "no warranty express or implied as to the quantity, kind, character, quality, weight, size, or description of any of the property." *Id.* at 6a, 44a. That disclaimer, the court explained, "simply precluded the purchaser from alleging a breach of contract if the goods failed to accurately match their description." *Id.* at 6a.

Finally, the court of appeals sustained the holding of the Court of Federal Claims that it lacked jurisdiction over petitioners' breach-of-contract claim. *Id.* at 10a-15a. Petitioners do not challenge that holding in this Court.

ARGUMENT

The court of appeals' decision is correct, does not conflict with the decision of any other court, and is based upon the application of settled legal principles to the specific facts of this case by the appellate court that Congress has entrusted to review government contract disputes. See 28 U.S.C. 1295(a)(3) & (10); 41 U.S.C. 609. Further review of this case is therefore not warranted.

1. a. Petitioners do not argue that the court of appeals' decision is contrary to any ruling of this Court. Petitioners contend (Pet. 8-10), however, that the court's decision conflicts with the Ninth Circuit's decision nearly fifty years ago in *United States* v. *Jones*, 176 F.2d 278 (1949). They are mistaken.

First, *Jones* involved a breach-of-contract claim, not a Just Compensation Clause claim. 176 F.2d at 279. The opinion thus did not address the issue presented by

the petition or decided by the court of appeals in this case. While petitioners did raise a contract claim below, that claim was dismissed for lack of jurisdiction (Pet. App. 10a-15a; 37 Fed. Cl. 256, 260-263), and petitioners have not sought further review of that dismissal or of the merits of their contract claim.

Second, *Jones* arose in a distinctly different factual context. In *Jones*, the goods at issue "clearly were within the scope of the sales contracts involved." Pet. App. 8a. The declarations described the property accurately and fully. *Jones*, 176 F.2d at 282. The contract, moreover, was for the "the residue of unsold items" in a shipyard. *Ibid.* Unlike the present case, the dispute in *Jones* thus did not concern what property the bill of sale "purport[ed] to transfer title or any other interest in," 40 U.S.C. 484(d). Instead, the issue was whether lack of authority or mistake would void a contract that explicitly embraced the property at issue. *Jones*, 176 F.2d at 288-290.[4]

Because *Jones* decided a different legal issue against a different backdrop, there is no basis for concluding that, a half-century later, the Ninth Circuit would decide the present case any differently than did the Federal Circuit.

b. Petitioners' contention (Pet. 9-10) that the court of appeals' ruling conflicts with *Pacific Harbor Capital*,

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[4] In addition, *Jones* interpreted a somewhat differently worded predecessor to 40 U.S.C. 484(d). *Jones*, 176 F.2d at 288-290 (discussing Section 25 of the War Surplus Property Act of 1944, Pub. L. No. 457, ch. 479, § 25, 58 Stat. 780 (repealed 1949)). The text of the 1944 Act addressed the disposition of government "property," while Section 484 applies to "surplus property." The transmissions at issue here are not "surplus property." *United States* v. *J & E Salvage Co.*, No. 92-162-Civ-4-H, slip op. at 3 (E.D.N.C. Aug. 19, 1994).

Inc. v. *Department of Agriculture*, 845 F. Supp. 1 (D.D.C. 1993); *East Tennessee Iron & Metal Co.* v. *United States*, 218 F. Supp. 377 (E.D. Tenn. 1963); *Turney* v. *United States*, 115 F. Supp. 457 (Ct. Cl. 1953); and *Appeal of Gonsalves*, A.S.B.C.A. No. 31874 (Mar. 10, 1986) (Pet. App. 41a-43a), does not warrant this Court's review.

First, conflicts with district court and administrative decisions are better policed, in the first instance, by the courts of appeals. Indeed, the Federal Circuit's decision here conclusively resolves any supposed conflict with the Court of Claims' ruling in *Turney* and the Armed Services Board of Contract Appeals' decision in *Gonsalves*. See 41 U.S.C. 607(g)(1).

Second, *Pacific Harbor*, *East Tennessee*, and *Gonsalves* all involved breach-of-contract-claims, not Just Compensation Clause claims. *Pacific Harbor*, 845 F. Supp. at 3-5; *East Tennessee*, 218 F. Supp. at 378-379; *Gonsalves*, Pet. App. 43a. While *Turney* did address a just compensation claim, the government there used military troops and a threatened embargo in a foreign country to compel surrender of property explicitly conveyed by the sales contract. 115 F. Supp. at 459-460, 463. That decision is thus of little help in analyzing the issue presented in this case, where the government acquired possession of property for which it claims title due to petitioners' voluntary compliance with a court order and a settlement agreement. See *Erosion Victims of Lake Superior Regulation* v. *United States*, 833 F.2d 297, 300 (Fed. Cir. 1987) (*Turney* turned upon a finding that the government exerted "substantial, direct involvement in view of then-pervasive United States military and economic presence" in the Philippines).

Third, in each of the cases petitioners cite, the property at issue was clearly encompassed by the sales contract. *Pacific Harbor*, 845 F. Supp. at 2 (bills of sale clearly covered exchange of planes; only issue was authority of agency to undertake the trade); *East Tennessee*, 218 F. Supp. at 378 (items sold were expressly described as "Building w/ contents"); *Turney*, 115 F. Supp. at 458 (property sold was described as all Army Air Force supplies at a specified air depot); *Gonsalves*, Pet. App. 42a (containers being sold bore labels identifying their contents, the purchaser knew the containers had contents, and the purchaser bid accordingly).

2. The decision of the court of appeals is correct. No taking occurred because the contract at issue did not convey the transmissions to petitioners. To present a viable claim under the Just Compensation Clause's mandate that "private property [shall not] be taken for public use, without just compensation" (U.S. Const. Amend. V), a plaintiff must first establish the existence of a property interest in the matter in dispute. *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992); see also *Phillips* v. *Washington Legal Found.*, 118 S. Ct. 1925 (1998). The contract documents in this case clearly described the items sold as shipping and storage containers, not the helicopter transmissions that had been inadvertently left inside the containers.[5] Nothing in the relevant papers indicated that the

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[5] Petitioners assert (Pet. 7) that there was no evidence in the record that the transmissions had been left in the containers inadvertently. The declarations of two contracting officials (see C.A. App. A177, A200-A201), however, supported the Court of Federal Claims' factual determination in that regard. 37 Fed. Cl. at 265.

contents of the containers, if any, would also be conveyed.

Petitioners' reliance on 40 U.S.C. 484(d) (Pet. 8-11) is misplaced. That provision states that a document "purporting to transfer title * * * in surplus property * * * shall be conclusive evidence of compliance with the provisions of this subchapter." In this case, Section 484(d) "does not create any presumptions regarding title to the transmissions because they were not mentioned either explicitly or implicitly in the contract documents." Pet. App. 9a. In other words, the sale documents did not "purport[] to transfer title" to the transmissions, 40 U.S.C. 484(d); their express terms transferred title only to the storage and shipping containers. See also 37 Fed. Cl. 264-266.

Petitioners also argue (Pet. 11) that Section 484(d) requires a presumption of compliance with all Defense Department Manual requirements, including the requirement that shipping and storage containers be certified as empty before disposal (see *id.* at 123a). The text of the statute, however, limits the presumption to compliance "with provisions of this subchapter." 40 U.S.C. 484(d).

In any event, it is "axiomatic that there is no taking where, pursuant to court order, the government is in possession of property to which it asserts a claim of rightful ownership." *DSI Corp.* v. *United States*, 655 F.2d 1072, 1074 (Ct. Cl. 1981). That is particularly true when, as here, the party invoking the Just Compensation Clause entered into and executed a voluntary agreement with the United States to reconvey the property in light of that court order. See C.A. App. A96-A97.

3. The petition does not present a Just Compensation Clause issue that is of general significance. In fact,

petitioners' claim sounds in contract, not Fifth Amendment, terms. As the Fourth Circuit explained in the initial stage of this litigation:

> The merits question presented is one of contract interpretation, *i.e.*, did the bill of sale and the accompanying [Defense Reutilization and Marketing Office] sales pamphlet allow a transfer of ownership of the hidden transmissions along with the containers purchased at the auction. This is a classic "scope of the contract" issue. * * * Every aspect of this case relates to these contract questions. All the evidence gathered during the discovery process deal with the documents generated during the sale, the conduct of the auction, and the authority of the [Defense Reutilization and Marketing Office] to enter into sales contracts. Furthermore, the dispute involves issues of custom and practice in government auctions. * * * The contract between the parties is the alpha and omega of this dispute.

Pet. App. 35a-37a. All but one of the cases on which petitioners rely (*Jones*, *Pacific Harbor*, *East Tennessee*, and *Gonsalves*, *supra*), moreover, were contract cases, not Just Compensation Clause decisions. The courts below ruled, and petitioners no longer dispute, that they (and thus this Court) lack jurisdiction to adjudicate petitioners' contract claim, because petitioners failed to comply with the requirements for presenting such a claim to the contracting officer in the first instance. Pet. App. 10a-15a; 37 Fed. Cl. at 260-263. That jurisdictional bar weighs against review by the

Court to consider what is essentially a breach-of-contract claim under the guise of a takings claim.[6]

In addition, the dearth of authority invoked by petitioners demonstrates the infrequency with which any issue of this sort arises or is left unresolved by the contract disputes process. Moreover, the unusual facts of the present case—where the government acquired possession of the property due to the petitioners' compliance with a court order and pursuant to a voluntary settlement agreement under which petitioners transferred title in the containers housing the transmissions back to the United States—indicate that further review would provide little guidance to other courts in other Just Compensation Clause cases.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6] Indeed, because the government provided petitioners an avenue for seeking redress of their contract claim (which they did not properly pursue), even had there been a taking, it would not have been without just compensation. See *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 194-197 (1985).